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No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., *et al.*,

Petitioners,

vs.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENTS IN OPPOSITION

PATRICK T. O'BRIEN #13106
BAUER, GALTER, O'BRIEN,
ALLAN & BUTLER
811 South 13th Street
Lincoln, Nebraska 68508
(402) 475-0811
Attorneys for Respondents Gage County, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Whether a remedy consisting of a refund of the difference between the tax actually levied and the tax which would have been levied if other property unconstitutionally exempted had been taxed to correct the disproportionality in Petitioners' property tax burden pursuant to the State Constitution's uniformity clause satisfies the due process requirement of the 14th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Respondents accept Petitioners' designation of parties in the Petition.

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OPINIONS BELOW

The opinion of the Supreme Court of Nebraska [hereinafter "State Court"], reprinted in Appendix A to the Petition, is reported as *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization*, 242, Neb. 273, 494 N.W. 2d 535 (1993) [hereinafter *"MAPCO II"*]. The opinion of the Nebraska State Board of Equalization and Assessment which was issued orally and subsequently transcribed in reprinted in Appendix B to the Petition. An earlier opinion of the Nebraska Supreme Court in the same case reported as *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization*, 238 Neb. 565, 471 N.W. 2d 734 (1991)

[hereinafter *"MAPCO I"*] is reprinted in Appendix C to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents are satisfied with the constitutional provision set forth in the Petition.

STATEMENT OF THE CASE

Respondents submit that an adequate and concise statement of the case, including all facts material to the question presented is provided in the statement of the case submitted in the Brief in Opposition of the Respondent State Board of Equalization and Assessment.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondents respectfully submit that the Petition should be denied.

I. McKESSON IS NOT APPLICABLE TO THE STATE COURT PROCEEDINGS

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990), this Court held as follows:

> When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principals long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain remedy," . . . , for the deprivation of tax moneys in an unconstitutional manner. In this case, Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 2258.

There are important distinctions between this case and *McKesson*. In the first place, this was a case in which the Petitioners originally sought to have the value of their personal property equalized with the value of railroad property which was not subject to taxation in Nebraska because of applications of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503(b)(4) (1992) [the 4-R Act]. Petitioners claimed, under Article VIII, Section 1 of the Nebraska Constitution, that the

value of their personal property should be reduced to zero for purposes of taxation. In effect, this would have exempted their personal property from taxation as was the railroad personal property under the 4-R Act. If successful in their "equalization" efforts, the Petitioners would have been entitled to an adjustment in their value, and a subsequent refund of any respective portion of their personal property taxes paid during the pendency of their litigation.

The Petitioners eventually, as required by law, paid their property taxes during the course of this litigation. Nevertheless, their characterization that they "paid these taxes under compulsion *and then sought refunds on the ground that the tax unlawfully discriminated against them*" (page 2 of Petition), is not accurate, as indicated above. The Nebraska Supreme Court in *MAPCO I*, determined that equalization of the value of Petitioners' personal property at zero percent was not an appropriate remedy but indicated that they were nevertheless entitled to some remedy to correct the real problem in this case which was determined to be the "disproportionality in taxation within a class of property". Id. at 579. The court also determined that several statutory exemptions of personal property, which had created the problem under the 4-R Act with railroad property, were also unconstitutional. The court made no determination that Petitioners' property taxes nor any portion thereof were unconstitutional.

In *MAPCO II* the court affirmed the subsequent action of the State Board of Equalization and Assessment on remand correcting "the disproportionality in taxation of appellant's property within the class of all tangible property in compliance with Article VIII, Section 1 of the

Nebraska Constitution and the due process clause of the 14th Amendment to the U.S. Constitution." Id. at 266, 267. The State Court also considered *McKesson* and determined that the remedy adopted by the Board nonetheless conformed with *McKesson*.

As indicated, this is not a case in which Petitioners brought this action in the first place seeking a refund because of a requirement to pay their taxes prior to obtaining a review of their validity. It also did not arise under the Commerce Clause of the United States Constitution. It thus did not involve, as in *McKesson*, a favored class of taxpayers and an unfavored class of taxpayers that suffered an economic disadvantage by virtue of the fact that the two classes were commercial competitors. The present case involved a property tax system and several exemptions from that property tax, including what amounted to an exemption for railroad personal property by virtue of the application of the 4-R Act. There were taxpayers who benefited from these exemptions by the lack of inclusion of the value of this property in their property tax base. All other taxpayers including the owners of residential, agricultural and business property, both personal and real, as well as Petitioners, were "disadvantaged" by such exemptions.

A few taxpayers, including the Petitioners, sought to benefit themselves by a reduction in the value of their property tax base by seeking what, in effect, amounted to a court mandated exemption of their personal property from taxation. The court rejected that relief. As recognized by the Nebraska Supreme Court, the disparity in this situation is clearly not one of economic disadvantage between commercial competitors, but lies in the fact that

all taxpayers will pay higher taxes as a result of the nontaxation of certain property in relation to the entire class of real and personal property. See also *Bohn v. Waddell*, 167 Ariz. 344, 807 P. 2d 1 at 8 (1991).

Furthermore, unlike *McKesson*, this was not a case in which Petitioners' tax itself was declared unconstitutional. Rather, the Nebraska Supreme Court in *MAPCO I*, determined that certain statutory exemptions were unconstitutional. The property tax that had been otherwise levied on Petitioners and all other taxpayers was nonetheless constitutional. See *Thayer v. South Carolina Tax Commission*, 413 S.E. 2d 801 at 815 (S.C. 1992). Finally, unlike the state solution adopted in *McKesson*, which amounted to no remedy at all, Petitioners here did receive meaningful relief as will be discussed further herein. See *Bohn v. Waddell, supra*, at 3 and 8.

Thus, the specific circumstances found in *McKesson* do not exist in the present case. While the Nebraska Supreme Court nevertheless determined that *McKesson* was complied with in this case, *McKesson* is not really applicable in this circumstance. *Thayer v. South Carolina Tax Commission, supra*, at 815; and *Bohn v. Waddell, supra*, at 6 and 8.

II. THE STATE COURT'S DECISION IS NOT CONTRARY TO THE DECISION OF THIS COURT IN McKESSON CORP. V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO.

By correcting the disproportionality in taxation experienced by the Petitioners in this case in the manner affirmed by the Nebraska Supreme Court, the Petitioners

were nevertheless treated fairly and in compliance with the provisions of *McKesson*. In *McKesson*, the court effectively authorized a spectrum of potential remedies for taxpayers. Id. at 2258. *McKesson* did not require, as asserted by Petitioners that the tax burdens in every event "must be equalized" (Petition, page 7). Rather, the court stated that the due process clause is satisfied "so long as the resulting tax actually assessed during the contested tax period reflects a scheme that does not discriminate against *interstate commerce* . . . " Id. at 2252 (emphasis added). As noted, this case does not deal with any unconstitutional discrimination against interstate commerce, but rather the question of disproportionality in state property taxation.

In effect, the action affirmed by the State Court amounts to "a refund of the excess tax paid" paid by the Petitioners in order to remove this disparity in taxation. This is comparable to the remedy suggested in *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928). As recognized by the State Court in *MAPCO II*, the excess tax in this case was not measured soley by the fact that some taxpayers escaped taxation because of the exemption of their property, but rather was measured by "the difference between the taxes levied against the property of the appellants and taxes which the appellants would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed." Id. at 266. This remedy satisfies the due process concerns of *McKesson*.

It is likewise a meaningful retroactive remedy as required by *McKesson*, and in addition provides a more substantial degree of fairness among all taxpayers.

Whereas, if the State Court had granted the relief requested by the Petitioners, it would simply have increased the amount of "discrimination" against the remaining taxpayers. Nothing in *McKesson* requires that these Petitioners receive more favorable treatment than the remaining taxpayers through the total elimination of their personal property tax under and otherwise constitutional tax scheme in order to satisfy due process and equal protection requirements of the United States Constitution.

Likewise, this situation is not at all similar to the "hypothetical scheme" adopted by the state of Florida and rejected by this court in *McKesson*. That so called "hypothetical scheme" was, in effect, a thinly veiled attempt to retain in place a tax scheme that had already been invalidated, and resulted in no remedy at all. The "hypothetical scheme" in *McKesson* amounted to an argument by the state that it would have imposed a higher tax rate on all distributors had it known the present law would be declared unconstitutional, and because the petitioner would have been in the same tax position under these hypothetical circumstances, it is not now entitled to a refund of any of the taxes that it actually paid. That it is not at all analogous to what the State Court accepted as an appropriate remedy in the markedly different circumstances existing in the Nebraska case. In this case, the State Board of Equalization and Assessment had developed a methodology by which the "excess taxes actually paid" by the Petitioners could actually be measured and refunded to them as required by *McKesson*, thus meeting the due process requirements of the 14th Amendment and providing meaningful relief.

The remedy adopted by the State Court, is likewise similar to remedies adopted by other courts in property tax cases. See *Siegal v. Newark*, 38 N.J. 57, 183 A. 2d (1962); and *Bade v. Drachman*, 4 Ariz. App. 55, 417 P. 2d 689 (1966). While those cases involved reductions in levels of assessments, the principles involved are nevertheless analogous and applicable to the remedy adopted by the State Court in *MAPCO II*. As a consequence, it should be apparent that the decision of the State Court in this case, particularly when considering the significant differences existing here, is consistent with the principles set forth by this Court in *McKesson*. The State Court decision, therefore, is not contrary to the decision of this Court in *McKesson*.

CONCLUSION

The petition for writ of certiorari should be denied.

GAGE COUNTY, et al, Respondents

PATRICK T. O'BRIEN, #13106
BAUER, GALTER, O'BRIEN,
ALLAN & BUTLER
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811
Attorneys for Respondents